

Issue: Group III Written Notice with Termination (client neglect); Hearing Date: 06/15/17; Decision Issued: 06/16/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10998; Outcome: No Relief – Agency Upheld.



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10998**

Hearing Date: June 15, 2017

Decision Issued: June 16, 2017

#### **PROCEDURAL HISTORY**

On February 24, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for client neglect.

On March 16, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 10, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 15, 2017, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Representative  
Witnesses

#### **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a DSA II at one of its facilities. He began working for the Agency in July 2014. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was working at the Facility in the early morning on February 7, 2017. He was responsible for performing checks on each patient every 15 minutes. He carried a clip board holding a Patient Monitor Sheet. As he looked inside each patient's room, he was to write down his observation on the Patient Monitor Sheet. He was supposed to open each patient's door and determine whether the patient was breathing.

At 3:20 a.m., the Male Patient left his room and walked down the hallway and into the room of the Female Patient. He remained there until 4:18 a.m. when Employee S discovered he was in the room as she was making her 15 minute checks.

Grievant wrote on the Patient Monitor Sheet that the Male Patient was in "Bedroom – eyes closed." Grievant wrote this for the times of 3:00 a.m., 3:15 a.m., 3:30 a.m., and 3:45 a.m.

At 3:24 a.m., Grievant walked past the Female Patient's room and did not look inside.

Grievant did not look into the Male Patient's room at approximately 3:30 a.m. and observe the Male Patient in his bed with his eyes closed. He later admitted he did not make bedroom checks of the Male Patient at 3:15 a.m., 3:30 a.m., and 3:45 a.m.

## CONCLUSIONS OF POLICY

The Agency has a duty to the public to provide its clients with a safe and secure environment. It has zero tolerance for acts of abuse or neglect and these acts are punished severely. Departmental Instruction ("DI") 201 defines Neglect as:

The failure by an individual, program, or facility operated, licensed, or funded by the department responsible for providing services to do so, including nourishment, treatment, care, goods, or services necessary to the health, safety, or welfare of a person receiving care or treatment for mental illness, mental retardation, or substance abuse.

Grievant was obligated to perform checks on the Male Patient every 15 minutes to ensure the safety of the Male Patient. He failed to perform checks on the Male Patient thereby neglecting to provide care to the Male Patient. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice with removal.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management ...."<sup>1</sup> Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the Agency inconsistently applied disciplinary action. Grievant asserted that Employee S also failed to make a check at 4 a.m. and, thus, should have received disciplinary action. The Agency's investigator testified that Employee S did not complete the 4 a.m. check because she did not receive the clipboard at 4 a.m. The Agency's perception that Employee S circumstances were different from Grievant's circumstances is sufficient evidence to show that the Agency did not single out Grievant for disciplinary action. In light of the standard set forth in the

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<sup>1</sup> Va. Code § 2.2-3005.

Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

## DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>2</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>2</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.